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No. 88-293

Supreme
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DEC 2
JOSEPH F. S
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, et al.,

Petitioners,

—against—

JAMES EARL REID,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF MAGAZINE PUBLISHERS OF AMERICA, INC., THE HEARST CORPORATION, THE NEW YORK TIMES COMPANY, PLAYBOY ENTERPRISES, INC. AND TIME INCORPORATED IN SUPPORT OF THE PETITIONERS

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Cases

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Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Company, 542 F. Supp. 252 (D. Neb. 1982) 17

Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984) ..... *passim*

Blum v. Stenson, 465 U.S. 886 (1984) 9

Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565 (2d Cir. 1966) 12

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Community For Creative Non-Violence v. Reid, 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 7, 1988) (No. 88-293) 2-3, 9-10, 18, 19

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Director, Office Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates, 459 U.S. 297 (1983) 9, 10

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Easter Seal Society For Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises, Inc., 815 F.2d 323, *reh'g denied*, 820 F.2d 1223 (5th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1280 (1988) ...2, 11, 13

Epoch Producing Corp. v. Killiam Shows, Inc., 522 F.2d 737 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976).....10, 13, 14

PAGE(S)

Evans Newton Incorporated v. Chicago Systems Software, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986) 16, 17, 18

Iris ARC v. S.S. Sarna, Inc., 621 F. Supp. 916 (E.D.N.Y. 1985)..... 16

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Nadel & Sons Toy Corp. v. William Shaland Corporation, 657 F. Supp. 133 (S.D.N.Y. 1987) 16, 18

Picture Music, Inc. v. Bourne, Inc., 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972).....10, 13

Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972)..... 14

Rytvoc, Inc. v. Robbins Music Corporation, 289 F. Supp. 136 (S.D.N.Y. 1967) 14

Sandwiches, Inc. v. Wendy's International, Inc., 654 F. Supp. 1066 (E.D. Wis.), *appeal dismissed*, 822 F.2d 707 (1987) 16

Sygma Photo News, Inc. v. Globe International, Inc., 616 F. Supp. 1153 (S.D.N.Y. 1985) 17

Thorn v. Browne, 257 F. 519 (8th Cir.), *cert. denied*, 250 U.S. 645 (1919)..... 10

United States Department of Health and Human Services v. Smith, 807 F.2d 122 (8th Cir. 1986) 9

PAGE(S)

Constitution and Statutes

U.S. Const. Art. 1, § 8 15

Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.* (1982) ..... *passim*

Section 101, 17 U.S.C. § 101 ..... *passim*

Section 201(b), 17 U.S.C. § 201(b) ..... *passim*

Section 201(c), 17 U.S.C. § 201(c) 5

Copyright Act of 1909, 17 U.S.C §§ 1, *et seq.* (1970) . *passim*

Section 26, 17 U.S.C. § 26 10

Legislative Materials

Copyright Law Revision Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 before Subcomm. No. 3 of the House Judiciary Comm., 89th Cong., 1st Sess. 30 (Comm. Print 1966) 15

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659 ..11, 12, 13, 15

S. 1223, 100th Cong., 1st Sess. (1987) 12

S. 2330 99th Cong., 2d Sess. (1986) 12

B. Varmer, *Works Made For Hire and on Commission*, Studies Prepared for the Subcommittee on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 2d Session 127 (Comm. Print 1960) 11, 14-15

Miscellaneous

PAGE(S)

A. Latman & J. Lightstone, *The Kaminstein Legislative History Project: A Compendium and Analytical Index of Materials Leading to the Copyright Act of 1976* (1983) 9

1 Nimmer & Nimmer, *Nimmer on Copyright* (1988).... 13

Restatement (Second) of Agency § 220 (1958) 3

N. Singer, *Sutherland Statutory Construction* (4th Ed. 1984) 10

INTEREST OF *AMICI CURIAE*

Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership 218 magazine publishers who publish 846 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

The Hearst Corporation ("Hearst") is a diversified privately held company which is engaged in a broad spectrum of commercial activities, including communications. It publishes newspapers, magazines and hard-cover and soft-cover books. Additionally, Hearst owns and operates a leading feature syndicate, television and radio broadcast stations and cable television systems.

The New York Times Company publishes numerous magazines and newspapers, including *The New York Times*, a daily newspaper with a nationwide circulation, and some thirty-five daily and weekly newspapers; it also owns radio, television and cable properties. *The New York Times* has a daily circulation of 1.1 million and a Sunday circulation of over 1.6 million.

Playboy Enterprises, Inc. ("Playboy") is a marketing and media company that publishes consumer magazines, merchandises Playboy's Rabbit Head Design and other trademarks through product and magazine licensing, publishes catalogues as part of its direct marketing operation, and produces and markets video programming for television and home video.

Time Incorporated is the largest publisher of general circulation magazines in the United States. Among the magazines it publishes are *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money* and *Life*.

SUMMARY OF THE ARGUMENT

Under the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.* (1982), (the "1976 Act"), a work created by an independent contractor is a "work made for hire" (or "work for hire") if the person for whom the work was prepared exercises supervision and direction over the independent contractor. The 1976 Act vests copyright ownership in an employer in the case of a work for hire. 17 U.S.C. § 201(b). A work for hire is defined as "(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use [within nine delineated categories] if the parties expressly agree in a written instrument . . . ." *Id.* at § 101.

Courts construing both the Copyright Act of 1909, 17 U.S.C. §§ 1, *et seq.* (1970) (the "1909 Act") and the 1976 Act consistently included within the definition of employee an independent contractor who is supervised and directed by the party commissioning the work. The present case is before this court because the Court of Appeals for the District of Columbia below, following the Fifth Circuit decision in *Easter Seal Society For Crippled Children and Adults of Louisiana v. Playboy Enterprises, Inc.*, 815 F.2d 323, *reh'g denied*, 820 F.2d 1223 (5th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1280 (1988), has suggested that this established definition be scrapped in favor of a far more restrictive definition of employee which would include only salaried employees or persons who are employees under the requirements of agency law. Such a confining definition finds no support or justification in the language of the 1976 Act, the legislative history of the 1976 Act or the policy underlying the Copyright Clause of the United States Constitution to foster and stimulate the creation of intellectual work for the public good.

Although the 1976 Act does not define "employee"[1] as used in section 101 or "employer" as used in section 201(b), or

1 Contrary to the conclusion of the Court of Appeals below (*Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1494 (D.C. Cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 7, 1988) (No. 88-293)), the term "employee" as used in the 1976 Act is not the same as "employee" within the meaning of agency law. See Restatement (Second) of Agency § 220 (1958).

"other person for whom the work was prepared" as used in section 201(b), courts have interpreted these terms to include employment relationships involving independent contractors who are supervised and directed. The element of supervision must be determinative of whether an employment relationship exists within the meaning of the Copyright Act—the other factors set out in the Restatement of Agency (*e.g.*, location of the work, the hours worked and the manner of payment) should not be. In determining whether a work is a work made for hire without a writing under section 101, courts must decide whether an employment relationship exists under subsection (1) of the definition (*i.e.*, whether the commissioning party supervised and directed the contractor). If such a relationship exists, the work must be deemed to be a work for hire, without consideration of subsection (2).

In the case at bar, the Community for Creative Non-Violence ("CCNV") conceived the entire work, including not only the sculpture executed by James Earl Reid ("Reid"), but also the steam grate and pedestal. CCNV specified the material Reid was to use in the sculpture and the resources he was to spend. Reid continually conferred with CCNV to ensure that the sculpture conformed to CCNV's concept and met CCNV's requirements for the entire work. Such ongoing and extensive supervision and direction compels the conclusion that Reid was an employee of CCNV within the meaning of the 1976 Act. In fact, CCNV's control over the sculpture exceeds the amount present in some "formal" employment relationships.

The legislative history of the 1976 Act supports the "supervision and direction" test for determining whether a work is for hire. When it enacted the 1976 Act, Congress implicitly approved of and adopted the judicial definition of the work made for hire provision which developed under the 1909 Act. Under the 1909 Act, which also provided that employers owned

the copyrights in works for hire and which also failed to define "employer," the courts held that if the employer supervised and directed the work of an independent contractor, the work would constitute a work for hire. When Congress passed the 1976 Act, it was aware of this traditional definition of the employment relationship. In declining to adopt a different definition of employer, Congress implicitly adopted the judicial interpretation of the term developed under the 1909 Act, which also provided that employers owned the copyright in the work.

Publishers of newspapers and magazines have a particularly strong interest in maintaining the "supervision and direction test" in those instances where they bring the work into existence through freelance designers, graphic artists, illustrators, writers, and photographers. Publishers through their editors often call freelancers after the editors have already conceived of a detailed concept for a work and of the manner in which it should be executed. Editors also make substantial changes in work submitted by freelancers so that the work conforms to the publisher's own concept and style.

Congress did not intend to divest publishers of copyrights in works they conceive, supervise and direct. The effect of such a policy would be to discourage the creative process because the party with greatest control and supervision over the form of the finished work would no longer have the requisite incentive to create.

ARGUMENT

I

MAGAZINE AND NEWSPAPER PUBLISHERS MUST RELY UPON WORK FOR HIRE RELATIONSHIPS WITH CONTRIBUTORS THEY SUPERVISE AND DIRECT

Magazine and newspaper publishers rely upon a variety of contributors in the preparation of written and illustrative material. However, it is frequently the publisher who conceives, inspires, shapes and directs the creative process. In such instances, without the driving energy of the publisher, the work would not be created. In order to nurture such creativity, the 1976 Act and its predecessor statute deliberately vested copyright ownership in employers, such as publishers, who direct and supervise the work of their contributors.

The 1976 Act treats in distinct ways publishers' relationships with various kinds of contributors. Some contributors are formal, salaried employees. With respect to such employees, the publisher withholds income taxes, deducts social security payments and unemployment compensation from their pay checks, and regularly includes them in the publisher's health and benefit plans. There can be no dispute that under subsection (1) of the work for hire definition of the 1976 Act, works produced by these employees are owned by the publisher.

On the other extreme of the spectrum, a significant number of contributors either have created work on their own or have been retained to create a work in the manner determined by the contributor, free of supervision and direction by the publisher. In the absence of a written agreement to the contrary, these writers, photographers and illustrators are presumed to have granted to the publisher one-time publication rights in an article, photograph or drawing under § 201(c) of the 1976 Act. Frequently, the contributor has already written the article or taken the photograph at the time the editor approaches her or him seeking the right to publish the work, or he or she submits the work to the editor for possible publication. On other occasions, a writer or photographer may suggest an interesting sub-

ject for possible publication and after obtaining the acquiescence of the editor of the magazine or newspaper, submits a final draft of the article or photograph. In these situations, the writer or photographer initiates or generates the creative concept, and the publisher is simply the medium for the expression and dissemination of that idea. As a result, both the publisher and the contributor understand that as a matter of law, custom and logic, the contributor, as creator, owns the work; the publisher merely obtains a one-time right to publish the work.

Publishers also employ, to a significant extent, contributors who are retained on a regular basis by the publishers, but are not salaried employees, even though they perform similar types of tasks. An editor may call in a non-salaried employee to prepare a specified piece of work, in accordance with the editor's concept and approach. For example, an editor of a weekly newsmagazine may ask an illustrator to prepare a line drawing to illustrate a staff-created article. In connection with such an assignment, the editor describes to the illustrator the nature of the desired drawing. If the drawing is not executed in accordance with the editor's design and specifications, the editor will insist that it be redrawn. Under the 1976 Act, a work created within this type of relationship constitutes a work made for hire by the publisher within subsection (1) of the work for hire definition since the person creating the work (here, the line drawing) is the editor and not the illustrator.

Similarly, some non-staff writers regularly act as "stringers" who cover stories in particular locales for a newspaper or weekly newsmagazine. The stringer obtains the facts and calls in the story or faxes a draft of the story to the publication. The editors then revise the article and make changes for accuracy, style, grammar, and punctuation. On occasion, an editor will alter the scope and viewpoint of the article to conform to the editor's concept and approach. The publisher may also assign a stringer to cover a discrete portion of a larger story, which portion is incorporated into the complete article.

As another example, an editor of a newspaper or magazine may conceive of a feature article with a particular subject, style and point of view. In such instances, the editor telephones the freelancer and describes the storyline and the desired focus of the article. The editor may also provide the writer with names, addresses, and telephone numbers of potential sources. Once the writer has completed her or his research and brought the first draft of the article to the office, the editor often line edits the story and publishes the article without further redrafting by or input from the writer.

In each of the above examples, the publisher, through its editor, conceives, supervises and directs the scope, content and style of the art work or article to be executed by the freelancer. The 1976 Act considers this type of relationship an employment for hire relationship and deems the publisher the owner of the copyright. Neither party to this relationship considers the article or illustration to be a joint work since the final version is entirely within the control of the publisher.

Since the 1909 Act, publishers have come to depend on these non-salaried employees based on their understanding that the copyright laws designated the publishers as the copyright owners for works created with supervision and control. Publishers have had no reason to assume that these non-salaried employees who perform the same tasks as salaried employees would be treated any differently. Magazine and newspaper publishers, consistent with the 1976 Act, do not have to resort to a formal writing which is required for unsupervised and undirected work under subsection (2) of the work for hire definition. The law permits these publishers to maximize flexibility in the creative process by permitting them to retain contributors (whom they supervise and direct) on a work for hire basis under subsection (1) of the definition. The broad view of employment under the 1976 Act[2] is not only consistent with the Act's long history of

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2 If this Court upheld the interpretation of the work for hire definition by the Court of Appeals below, there would be a devastating impact on the software programming industry. Creators of software

interpretation and with the Copyright Clause of the Constitution but also with our society's commitment to expansive and robust speech based in the First Amendment.

II

UNDER THE COPYRIGHT ACT OF 1976 A WORK CREATED BY AN INDEPENDENT CONTRACTOR UNDER THE SUPERVISION AND DIRECTION OF AN EMPLOYER CONSTITUTES A WORK MADE FOR HIRE

The copyright in the sculpture conceived by CCNV plainly belongs to CCNV and not to its employee, Reid. Under the 1976 Act, a work executed by an independent contractor, such as Reid, is a work made for hire where the employer exercises direction and supervision over the independent contractor's work. Section 201(b) of the 1976 Act provides:

> In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

Section 101 of the 1976 Act defines "work made for hire" as

> (1) a work prepared by an employee within the scope of his or her employment; or

programs hire persons to implement and execute the creative concept. Since computer programs do not fit within any of the nine categories under subsection (2) of the work for hire definition, the creator could own the software program (under the view of the Court of Appeals below) only if the programmer or freelancer could be construed as an employee under agency law. The requirement for all software creators to hire all programmers as salaried employees would undoubtedly stifle the creation of new and novel programs. Other works which are not within the nine categories of subsection (2) (such as corporate annual reports) can only be prepared by salaried employees in order for the employer/commissioning party to have permanent ownership and control of those works during the period covered by copyright.

> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire . . . .

17 U.S.C. § 101.

A. The Legislative History of the 1976 Act Did Not Disturb the Established Meaning of Employee Under the Work For Hire Doctrine Developed Under the 1909 Act

In the 1976 Act, Congress did not define or otherwise clarify the terms "employee" or "employment" as contained in the work made for hire definition in section 101 of that Act. It is axiomatic that this Court should refer to the legislative history, *Blum v. Stenson*, 465 U.S. 886 (1984), or case law interpreting a preexisting statute in order to construe an ambiguous or undefined term in an existing statute. *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates*, 459 U.S. 297, 318-321 (1983); *United States Department of Health and Human Services v. Smith*, 807 F.2d 122 (8th Cir. 1986).

The legislative history of the 1976 Act is of limited use in discerning Congress' intent in using the term "employee." Although Congress held hearings and solicited reports for over twenty years prior to the enactment of the 1976 Act, the scope of the term "work for hire" received scant attention by Congress. A review of the legislative history reveals an absence of any Congressional debate regarding the definition of the employment relationship within the meaning of the definition of work for hire. 3 A. Latman & J. Lightstone, *The Kaminstein Legislative History Project: A Compendium and Analytical Index of Materials Leading to the Copyright Act of 1976* 327-377 (1983). In addition, the law review articles and other commentaries cited by the Court of Appeals below, *Community for*

Creative Non-Violence v. Reid, 846 F.2d 1485, 1489 (D.C. Cir.), *cert. granted*, 57 U.S.L.W. 333 (U.S. Nov. 7, 1988) (No. 88-293), fail to identify any legislative history in which Congress defined the term "employee" as a *salaried* employee. Although the Court of Appeals was "particularly impressed" by commentary of these copyright scholars, the fact is that these commentators based their interpretation of the work for hire definition entirely on what they construed to be Congress' intent. The lack of Congressional discussion, therefore, does not support their analysis and furthermore underscores the need to consider prior decisions interpreting the work for hire doctrine and the nature of an "employee" under the 1909 Act.[3]

Congress was certainly aware of the developed case law definition of "employee" under the 1909 Act. *See Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). Courts had generally found a work for hire relationship if the commissioning party exerted some supervision and direction over the person preparing the work. *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976); *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216-17 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972); *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 643 (2d Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968). When Congress uses a term with a judicially interpreted meaning, courts presume that Congress intended to adopt that meaning. *Perini*, 459 U.S. at 318-321; *Thorn v. Browne*, 257 F. 519 (8th Cir.) *cert. denied*, 250 U.S. 645 (1919); N. Singer, *Sutherland Statutory Construction*, § 47.30 (4th Ed. 1984). Moreover, Congress is presumed to know the case law extant at the time it passes a new statute. *Sutherland* at § 50.01. If Congress did not express an intention to change the existing law, the courts should not infer such an intention. *Id.*

There is evidence, however, that Congress *considered* and *rejected* a proposal to limit the definition of works made for

3 Section 26 of the 1909 Act defined "author" to ". . . include an employer in the case of works made for hire."

hire to works created under a formal salaried employment relationship and to eliminate works by non-salaried employees from its scope. Although he did not advocate such a modification, Borge Varmer, then Attorney-Adviser of the Copyright Office, suggested in the proposal prepared for a Senate subcommittee that

> [i]f the employment-for-hire rule is not to extend to works created on commission at a fixed fee, the definition might further specify "employment on a salary basis."

B. Varmer, *Works Made For Hire and on Commission*, Studies Prepared for the Subcommittee on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 2d Session 127, 141 (Comm. Print 1960) ("Varmer Study"). Congress did not accept this proposal—since it seems it was satisfied with the broader definition.

Even the Fifth Circuit recognized that under the 1909 Act the term employee included independent contractors that were supervised and directed and that to limit the definition of the employment relationship to include only formal salaried employment relationships would be a radical departure from earlier law. *Easter Seal*, 815 F.2d at 330. If Congress had intended to alter the existing law, it would have made its intention clear in the words of the statute and in the legislative history. *Id.* at 331; *Aldon Accessories*, 738 F.2d at 552. Not only was no such intention expressed, but also Congress affirmatively stated its intention *to reenact the prior law*. In the first line of the House Report accompanying the bill which was ultimately adopted, Congress stated the law's intent:

> Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5736 ("House Report").

It is not the proper role of this Court to infer a Congressional intent to alter drastically prior law where Congress has failed to indicate such an intention. In fact, bills have recently been introduced in the U.S. Senate to change the definition of work made for hire to include only employees who receive employment benefits and whose taxes are withheld from their compensation. S. 1223, 100th Cong., 1st Sess. (1987); S. 2330, 99th Cong., 2d Sess. (1986). The authority to change the law in this respect resides in the Congress.

On the other hand, it is apparent from subsection (2) of the definition of work for hire that Congress *did* intend to limit the extent to which unsupervised commissioned parties could fit within the work made for hire definition. In the House Report, Congress described its purpose with regard to subsection (2) in the following manner: "The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as 'works made for hire,' and those that should not." House Report at 121. This definition of work for hire still compels a court to determine at the outset whether the hired party was supervised and directed so as to be considered an "employee" within the meaning of subsection (1) or whether the hired party is free of supervision and direction and, therefore, is eligible under subsection (2). *Aldon Accessories*, 738 F.2d at 552.

According to the *Aldon* court, Congress enacted subsection (2) of the definition in order to reverse the presumption under the 1909 Act that the copyright in works prepared by unsupervised and undirected independent contractors belonged to the hiring party. *Aldon Accessories*, 738 F.2d at 552; *see, e.g., Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298 (9th Cir. 1965) (presumption that hardware company which hired but did not supervise an artist to illustrate its catalogue owned the copyright in the drawing). Relying on the presumption set forth in these early cases, several courts held that the party at whose "instance and expense" the work was created owned the copyright. *See Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966) (copyright in advertising

copy belongs to advertisers at whose request newspaper created the advertisement).[4]

According to the *Aldon* Court, "[i]t was apparently felt that this [presumption] frequently worked an injustice in those situations where the contractor did all of the creative work and the hiring party did little or nothing." *Aldon Accessories*, 738 F.2d at 552 (citing House Report at 121). The Court made it clear, however, that Congress did not thereby intend to dispense with the traditional test for the existence of an employment relationship under subsection (1):

> But there is no indication in the legislative history or elsewhere that Congress was focusing on contractors who were actually sufficiently supervised and directed by the hiring party to be considered "employees" acting within the "scope of employment."

Id.

Courts interpreting the 1909 Act focused on the degree of the commissioning party's supervision and direction over the contractor in determining whether an employment relationship existed. *See* 1 Nimmer & Nimmer, *Nimmer On Copyright*, § 5.03 [B], at 5-13 (1988). In *Epoch Producing*, a film production company ("Epoch") claimed that it owned the copyright in the movie *The Birth of a Nation* because D.W. Griffith ("Griffith"), the film's producer and director, was an employee who made the film for Epoch as a work made for hire. 522 F.2d at

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4 In *Easter Seal*, the Fifth Circuit inaccurately charts the development of the work made for hire cases under the 1909 Act by suggesting that since *Brattleboro*, the determination of an employment relationship had degenerated into a pure "instance and expense" test. 815 F.2d at 325-27. The *Easter Seal* Court describes the cases in this way to support the view that Congress intended to limit severely the type of relationship that could qualify as employment. *Id.*

But *Easter Seal* ignores the cases in Point II B, *infra*, and in *Aldon Accessories*, 738 F.2d at 552, where a court looked to the extent to which the commissioning party supervised the contractor to determine whether an employment relationship existed. *See Epoch Producing*, 522 F.2d at 744; *Picture Music*, 457 F.2d at 1216-17; *Donaldson Publishing Co.*, 375 F.2d at 643.

741. In rejecting Epoch's claim, the Second Circuit pointed to a lack of evidence of an employment relationship between Epoch and Griffith. *Id.* at 744. Specifically, the Court noted that there was no evidence that Epoch had controlled or supervised Griffith's work:

> The evidence relied upon by Epoch does not, for instance, indicate whether [Epoch] simply supplied capital for the production of the picture, whether they commissioned Griffith independently to produce the film, whether they "hired" Griffith as employee to do the work *and, most important, whether they could have exercised the requisite power to control or supervise Griffith's work, which is the hallmark of "an employment for hire" relationship.*

Id. (citations omitted) (emphasis added). *See Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972) (the court determined that plaintiff's predecessor in interest, a song writer who was hired by a music company to adapt an existing song, was an employee for the purposes of work made for hire); *Rytvoc, Inc. v. Robbins Music Corporation*, 289 F. Supp. 136 (S.D.N.Y. 1967) (extent of employer's right to exert supervision and control is the determinative factor in question of whether songwriter composed song as work made for hire).

Indeed, there is evidence in the legislative history that Congress differentiated between a "work specially ordered or commissioned" and a "work prepared by an employee within the scope of his employment" in order to distinguish between the hiring party who sufficiently supervises and controls his employee and the hiring party who simply hires a person to create a work but provides no such supervision or control. In his study, Varmer articulated this distinction:

> [T]he common law generally has differentiated between the employer-employee relationship and that of the parties to a contract for a commissioned product: in broad terms, the acts of an employee as such are imputed to his employer, but those of an independent contractor are not imputed to the person for whom he performs a special commission. *Underlying this distinction is the premise that an employer generally gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor.* Perhaps in recognition of this principle, the statutory provisions in the United States regarding the employer's ownership of copyright in works made for hire . . . have not been extended to commissioned works generally.

Varmer Study at 142 (emphasis added). Thus, it is the element of control which is crucial in determining the difference between a work created pursuant to an employment relationship and a commissioned work. As Varmer recognized, "[t]he differences in type of payment or regularity of working hours between the employment and commission situations would not seem to be crucial reasons for different treatment." Varmer Study at 142.

Furthermore, the *Aldon* approach of determining the presence of an employment relationship on the basis of control advances the general policy underlying the 1976 Act and the Constitution of the United States. That policy, as set forth in the committee report accompanying the 1909 Act was quoted at a Congressional hearing in 1965:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.

Copyright Law Revision Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 before Subcomm. No. 3 of the House Judiciary Comm. 89th Cong., 1st Sess. 30 (Comm. Print 1966) (prepared statement of George Cary, Deputy Register of Copyrights). *See* U.S. Const. art. 1, § 8; House Report at 47. The purpose of promoting the public interest is advanced by grant-

ing copyright ownership to the party who has caused the work to be shaped into its final form. In the employment relationship work for hire cases, none of the works involved would have been created absent the initiative, supervision and direction of the commissioning party. See Point II B, *infra*. It is this party who must be given the incentive to create. As Varmer recognized, the formalities of the employment relationship do not determine the presence of such control. It is the policy of the 1976 Act, therefore, to ensure that the commissioning party—the initiating party—who exercises supervision and direction over its employee will own the copyright in the resulting work.

B. The Supervision and Direction Test Has Been Adopted By Numerous Courts in Interpreting the Work Made For Hire Definition In Section 101 of the 1976 Act

The judicial view under the 1909 Act that a work for hire encompassed more than a formal salaried employment relationship was adopted by several courts in construing the "work made for hire" definition under section 101 of the 1976 Act. Indeed, courts have continued to rule that the critical factor in identifying the existence of an employment relationship under the Act is whether the employer *exercised its right to direct and supervise* the employee-contractor's performance. *Evans Newton Incorporated v. Chicago Systems Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986); *Aldon Accessories*, 738 F.2d at 548; *Nadel & Sons Toy Corp. v. William Shaland Corporation*, 657 F. Supp. 133 (S.D.N.Y. 1987); *Marshall v. Miles Laboratories, Inc.*, 647 F. Supp. 1326 (N.D. Ind. 1986); *Iris ARC v. S.S. Sarna, Inc.*, 621 F. Supp. 916 (E.D.N.Y. 1985).

Other courts, although finding that no employment relationship existed in particular cases, have applied the "supervision and direction test" to the facts before them. *See, e.g., Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987); *Joseph J. Legat Architects, P.C. v. United States Development Corporation*, 625 F. Supp. 293 (N.D. Ill. 1985); *Sandwiches, Inc. v. Wendy's International, Inc.*, 654 F. Supp. 1066 (E.D. Wis.), *appeal dismissed*, 822 F.2d 707 (1987);

Sygma Photo News, Inc. v. Globe International, Inc., 616 F. Supp. 1153 (S.D.N.Y. 1985); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Company*, 542 F. Supp. 252 (D. Neb. 1982).

In *Aldon Accessories*, Aldon, a designer and manufacturer of brass and porcelain figurines brought an action against Spiegel alleging that Spiegel had infringed its copyright in certain brass figurines designed in the form of a unicorn. 738 F.2d at 551. In its defense, Spiegel claimed that Aldon's copyright as a work made for hire was invalid since Aldon had commissioned certain companies in Japan and Taiwan to create and manufacture the figurines and those companies did not fit within either part of the work for hire definition in section 101. *Id.*

The Second Circuit rejected Spiegel's "overly restrictive interpretation of subdivision (1)" of the definition and expressly held that the 1976 Act did not abandon the definition of an employee which had developed under the 1909 Act. *Aldon Accessories*, 738 F.2d at 551-52. Applying that standard to the facts in *Aldon*, the Second Circuit held that there was ample evidence for the jury's finding that Aldon had exerted sufficient supervision and direction over the manufacturers to bring the figurines within the work made for hire doctrine. *Id.* at 553.

Several courts have adopted and applied the *Aldon* "supervision and direction" test. For example, in *Evans*, the Seventh Circuit expressly adopted the *Aldon* standard for determining whether a work constituted a work made for hire under the 1976 Act. That Court found "the Second Circuit's analysis and conclusion [in *Aldon*] compelling." 793 F.2d at 894. In *Evans*, plaintiff, a corporation which provided recordkeeping systems to educational institutions, had hired defendant, a computer programming firm, to program a new management program to be compatible with a Commodore computer. *Id.* at 891. The Court found that before hiring defendant, plaintiff's president

> . . . wrote the system bid guidelines with programming specifications. This included flow diagrams and prepared numbering and coding systems. [He] also developed sam-

> ple printouts and reports incorporating all of the concepts developed by [plaintiff] for computer-managed instruction.

Id. The Seventh Circuit affirmed the District Court's determination that plaintiff's preparatory work demonstrated that it had sufficiently supervised and directed defendant's programming work. *Id.* at 894. *See also Nadel & Sons Toy Corp.*, 657 F. Supp. at 133 (motion for summary judgment by company hired to create a unicorn statuette for plaintiff denied because plaintiff set forth facts indicating plaintiff's president may have exercised control in instructing changes in samples); *Marshall*, 647 F. Supp. at 1326 (company for whom scientist worked owned copyright in certain of the scientist's papers under work made for hire since company had exercised its policy of reviewing and approving all papers which were to be submitted by its employees).

This case law strongly supports the view that the 1976 Act did not change the meaning of the terms "employee" or "employer" which had developed under the 1909 Act. Applying the *Aldon* standard to the instant case, it is clear that plaintiff CCNV should be considered the author of the statue under subsection (1) of the definition of work for hire as set forth in the 1976 Act.[5] The facts show that representatives of CCNV exercised significant supervision and direction over the work of sculptor Reid. As with the representative of Aldon, members of CCNV conceived of, in "starkly specific detail," the statue as:

> a sculpture of a modern Nativity scene in which, in lieu of the traditional Holy Family, the two adult figures and the infant would appear as contemporary homeless people huddled on a streetside steam grate. The family was to be black (most of the homeless in Washington being black); the figures were to be life-sized, and the steam grate would be positioned atop a platform "pedestal," or base, within which special-effects equipment would be enclosed to emit

5 Indeed, the Court of Appeals conceded that if the *Aldon* test applied, the statue would be a work for hire, owned by CCNV. *Community For Creative Non-Violence*, 846 F.2d at 1497, n. 18.

> simulated "steam" through the grid to swirl about the figures. They also settled upon a title for the work—"Third World America"—and a legend for the pedestal: "and still there is no room at the inn."

Community For Creative Non-Violence v. Reid, 652 F. Supp. 1453, 1454 (D.D.C. 1987), *rev'd*, 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 7, 1988) (No. 88-293).

In addition, CCNV members spoke with Reid on two separate occasions to discuss the form of the statue (*id.* at 1454), Reid provided preliminary sketches of the figures (*id.* at 1455), CCNV took Reid on a tour of the Washington homeless and suggested a family to be used as models. *Id.* Of great significance, CCNV assumed responsibility for constructing the steam grate and the pedestal upon which the sculpture would sit. *Community For Creative Non-Violence*, 846 F.2d at 1487. During the course of the project Reid conferred "from time to time with various CCNV members and [made] changes to the form and arrangement of the figures to accommodate CCNV's requests." *Id.* at 1487-8.

CCNV's substantial contribution to the statue—from conception to completion—demonstrates that it should be considered the author of the sculpture. As in *Aldon*, CCNV was "in a very real sense the artistic creator" of the statue. *Aldon Accessories*, 738 F.2d at 553. As the District Court concluded:

> [CCNV] then engaged Reid to utilize his representational skills, rather than his original artistic vision, to execute it. And while much was undoubtedly left to his discretion in doing so, CCNV nevertheless directed enough of his effort to assure that, in the end, he had produced what they, not he, wanted, notwithstanding his creative instincts may have been in harmony with theirs.

Id. at 1456.

The relationship between CCNV and Reid is remarkably similar to the typical relationship between a magazine or newspaper publisher and the freelance writers and graphics people it

employs for a given issue. The editorial product is very much the creation of the publication. A freelancer is often sent to a specific location at the publication's expense to do a specific assignment in conformity with the editor's instructions. Upon the freelancer's completion of the assignment, the product is reworked and edited to conform to the publication's approach and style. The work product is thus owned by the publisher.

CONCLUSION

An independent contractor supervised and directed by a commissioning party is an employee, and the work created under such a relationship is a work made for hire, within the meaning of the 1976 Act. Courts adopted that definition under the terms of the 1909 Act. In enacting the 1976 Act, Congress did not intend to alter the established meaning of an employee. Instead, Congress intended to further the Constitutional policy of promoting science and the useful arts. This goal can only be accomplished by vesting copyright in the party which conceives and commissions the work and supervises its execution. The courts consistently held this view under the 1976 Act until the decision below in the instant case and the Fifth Circuit's decision in *Easter Seal*. A restrictive definition of employee, based solely on agency law criteria, would inhibit the very purpose Congress sought to achieve. If there is to be a change in the law it should not be made by affirming the Court below, but rather by referring the questions back to Congress for any change in the meaning and interpretation of the law enacted in 1976. Accordingly, this Court should reverse the decision of the Court of Appeals for the District of Columbia.

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